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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 572

HAROLD MARSHALL COPELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 66–70; Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1961 (R. 70). The petition for a writ of certiorari was filed on November 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence, independent of statements made by the conspirators, to show peti-

tioner's participation in the conspiracy, and thus render admissible against him extra-judicial statements by the other conspirators.

STATEMENT

Petitioner and other co-defendants were convicted of a conspiracy to violate the federal tax legislation on distilled spirits (R. 43–46). Petitioner was sentenced to a term of imprisonment of 40 months (R. 1–2). On appeal, the court of appeals affirmed the conviction (R. 70).

The conspiracy was proved primarily through the testimony of Brown, an agent, who worked for the co-defendant Wilson in September and October 1960, when the distillery was seized (R. 3–4). Wilson furnished sugar and fruit jars to petitioner and co-defendant White, who operated the distillery and furnished whiskey to Wilson (R. 10, 14, 24).

1. The independent evidence, other than the statements by co-conspirators, to show petitioner's participation included the following:

On October 8, at a meeting with Wilson, Brown, and others, petitioner said he needed some jars for the still. Brown and another man brought jars in Virginia and delivered them in North Carolina by truck to a place previously designated by petitioner (R. 13–16). Petitioner directed Brown to stay with the truck and then left (R. 17–18). At about 4:00 the next morning, petitioner returned and directed Brown to follow petitioner's car (R. 18–19). The truck was subsequently left in front of a house near the still (R. 19–20, 21). On the trip back in the car, petitioner told Brown that he was "putting out a

little better than a hundred cases a day" (R. 21) and that, so long as Wilson would sell him the sugar at $12 a bag, he would sell the whiskey at $20 a case. Petitioner further stated that, according to their agreement, he would get one-half of the turnout and that Wilson and Brown would get the other half (R. 22).

Brown also testified that on October 16, 1960, in accordance with his arrangement with petitioner, he went to the Sharp residence to get liquor (R. 49). When petitioner failed to show up, Brown went to petitioner's residence in North Carolina where he found the petitioner. Petitioner told Brown that Wilson had not delivered the amount of sugar that he had promised; that petitioner would therefore have to raise the price of the liquor up to $22 a case; but that, if Wilson went back to his original agreement to sell sugar at $12 a bag and the jars at cost, petitioner would lower the price of his liquor to $20 a case (R. 50). During the night of October 17–18, Brown hauled 450 gallons of whiskey, while petitioner acted as a look-out to make sure that they were not being followed (R. 53–55).

2. The trial court admitted, over petitioner's objection, Brown's testimony concerning statements by Wilson and Sharp implicating petitioner in the conspiracy. The first statement concerned petitioner's activities on October 5, 1960. Brown testified that on October 5 Wilson had told Brown that he had seen petitioner and co-conspirator White with respect to furnishing them sugar and that he had an agreement with White and petitioner to furnish them sugar at $12 per 100-pound bag and jars at cost for which

he would receive in return whiskey at $20 a case (R. 9–10).

The second statement concerned the activities of the conspirators on October 15, 1960. Brown testified that, on October 15, Wilson had instructed Brown to go to petitioner's residence and pick up 200 cases of whiskey. When Brown did not find petitioner at home, he went to the home of co-conspirator Sharp. Sharp informed Brown that he did not know where petitioner was, but that petitioner and White had been at his home earlier and were probably at the distillery or out gathering sugar (R. 41–42).

ARGUMENT

1. There was sufficient evidence, without the statements in question, to justify the jury's inference that petitioner was a member of the conspiracy. That evidence consisted of petitioner's own actions and statement to agent Brown which showed that, prior to October 6, 1960, petitioner, together with the other conspirators named in the indictment, was operating the illicit distillery. Thus, there was a firm basis for the application of the well-established rule that declarations of a conspirator are admissible against his co-conspirator, although not made in his presence, provided they were made in furtherance of the objects of the conspiracy. *Krulewitch* v. *United States*, 336 U.S. 440, 443; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Pinkerton* v. *United States*, 328 U.S. 640, 647; *Glasser* v. *United States*, 315 U.S. 60, 74; *Bartlett* v. *United States*, 166 F. 2d 920 (C.A. 10); *United States* v. *von Clemm*, 136 F. 2d 968 (C.A. 2), certiorari

denied, 320 U.S. 769; *Thomas* v. *United States*, 57 F. 2d 1039 (C.A. 10); *Minner* v. *United States*, 57 F. 2d 506, 511 (C.A. 10).

2. Even though the court admitted into evidence the first statement to which Brown testified before petitioner's participation in the conspiracy had been proved by direct evidence, the court committed no error, for the order of proof is discretionary with a trial court. *Glasser* v. *United States*, *supra*, 315 U.S. at 81; *Bartlett* v. *United States*, *supra*, 166 F. 2d at 925. The court admitted the second statement only after there had been considerable evidence showing petitioner's major involvement in the conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be denied.

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